

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

75-1288

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1288

UNITED STATES OF AMERICA,

Appellant,

—v.—

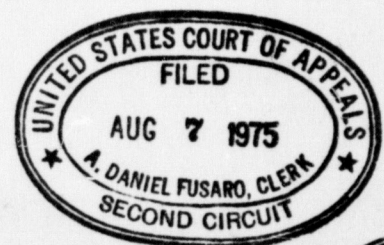
HERBERT YAGID,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*



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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE CARTER

D. C. Form No. 100 Rev.

Docket Entries

73 CRIM. 471

TITLE OF CASE

THE UNITED STATES

For U.S.: 26h-3938

Secial A.T.S. Atty.

Michael C. Eterhardt

vs.

- 1) JERRY ALLEN 2-21-75
- 2) SALVATORE THOMAS RABALANTE 4-11-74
- 3) ARTHUR BERARDELLI 4-11-74
- 4) JAMES PERRY 3-8-74
- 5) LOUIS STERN, a/k/a Louis Rush 4-11-74
- 6) LEONARD TURI 4-11-74
- 7) HERBERT YAGID 4-11-74

For Defendant:

(05) STATISTICAL RECORD

COSTS

DATE

NAME OR
RECEIPT NO.

REC.

DISB.

J.S. 2 mailed

Clerk

J.S. 3 mailed 4-2-74

Marshal

(Continued from 15-17) Violation

Docket fee

Title 18

Sec. 238, 2 transport in
Interstate Commerce
counterfeited securities
(ct. 2)

371 conspiracy so to
do (ct. 1) --- TLO CONF---

PROCEEDINGS

DATE

5-21-73

Filed Indictment.

JERRY ALLEN - SALVATORE T. RABALANTE and HERBERT YAGID - B/W's ordered. --
Cannella, J.

B/W's issued for above 3 defendants.

6-1-73

JERRY ALLEN - Deft. arrested - bail fixed at \$15,000. P.R.B. - Deft. ordered
photographed and fingerprinted. Hearing adj. to June 11, 1973. -
Cannella, J.

6-1-73

Allen-Filed P.R.B. in the sum of \$15,000. dtd. 6/1/73.

6-11-73

J. Allen- Filed affdvt. and notice of motion for an order extending defendants
bail limits to include the Continent of Europe, Canada and the State of
Florida. -- ret. 6-11-73 in En 110

6-11-73

J. Allen- Filed memo endorsed on above motion: " Application granted on U.S. Atty's
request. Submit order on consent. -- Palieri, J.

DATE	PROCEEDINGS
6-13-73	LOUIS STERN and HERBERT YAGID-Filed affdvt & notice of motion for-Discovery & inspection xxxxxxxx Bill of Particulars etc.-Ret. 6-22-73.
6-11-73	ALLEN, BADALAMENTE, BERARDELLI, STERN, TURI and YAGID (attys present) plead not guilty. Bail cont'd. FEENEY (atty present) plead not guilty. Fingerprinted & Photographed. R.O.R. \$10,000. P.R.B.---Palmieri, J.
6-15-73	JAMES FEENEY-Filed order-Bail limits are extended to allow deft. to travel throughout the U.S., Canada and Europe etc.--Carter, J.
6-18-73	SALVATORE, THOMAS, BADALAMENTE AND LEONARD-Filed affdvt & notice of motion for Discovery and inspect Inspection, Bill of Particulars etc. Ret. 6-22-73.
6-13-73	SALVATORE THOMAS BADALAMENTE-Filed Warrant for Arrest with Marshal's return-District of N.J.-Deft. arrested 5-22-73-Released same day \$10,000. PRB.
6-13-73	HERBERT YAGID-Filed Warrant for Arrest with Marshal's return-Arrested by FBI Agent Released \$10,000. PRB.
6-11-73	JAMES FEENEY-Filed PRB without security in the sum of \$10,000.
6-19-73	JAMES FEENEY-Filed notice of appearance of Marvin B. Segal Marvin B. Segal 375 Park Ave. N.Y.C. Pl 3-7800
6-19-73	JERRY ALLEN-Filed notice of appearance of Feldshuh & Frank, 144 E. 44th St. N.Y.C. 687-8
6-19-73	LEONARD TURI & SALVATORE BADALAMENTE-Filed notice of appearance of Salvatore Nigrone 233 B'way N.Y.C. Wo 4-8883
6-19-73	LOUIS STERN & HERBERT YAGID-Filed notice of appearance of Paul P. Rao, 233 B'way N.Y.C. WO 4-8866
6-21-73	Filed Governments notice of readiness for trial.
6-21-73	Jerry Allen- Filed order extending defendants bail limits to include the Continent of Europe, the country of Canada and the State of Florida, during the pendency of his prosecution. The deft. to give notice to the U.S. Atty. prior to his departure from the S.D. of N.Y. and within 48 hours of his return thereto. Carter, J.
7-10-73	Herbert Yagid-Filed affidavit and notice of motion for an order permitting the deft. to extend his bail limits to the Continental U.S.
7-10-73	Herbert Yagid-Filed order on deft's motion to extend bail limits. "Deft's bail limits extended to the Continental U.S. consented by Govt. (mailed notice) Carter, J.
7-16-73	FEENEY- Filed affdvt. and notice of motion (a) inspection of grand jury minutes (b) a bill of particulars (c) to inspect and photograph certain documents. FEENEY- Filed defts. memorandum of law in support of above motion.
7-24-73	BADALAMENTE- Filed defts. affdvt. and notice of motion for an order extending defts. bail limits. - ret. 7-24-73
7-24-73	BADALAMENTE- Filed order extending defts. bail limits to incl. the continental U.S.A.- Carter, J.

DATE

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PROCEEDINGS

7-26-73	All defts'- Filed Governments affdvt. in opposition to motions for discovery & inspection, bill of particulars, disclosure of Grand Jury minutes and dismissal.
7-26-73	All defts'- Filed Governments affdvt. in opposition to defts pre-trial motions.
7-31-73	Jerry Allen- Filed order further extending defts. bail limits to include all of the continental USA
8-6-73	ALL DEFTS - Filed Govts notice of motion for reargument of Court's decision to inspect.
8-20-73	Filed Govts affdvt & notice of motion for rehearing.
8-20-73	Filed Govts memorandum of law.
9-6-73	Filed Govts. Bill of Particulars w/requests of Defts. Turi and Badalamente.
9-11-73	ALL DEFENDANTS- Filed Governments supplemental bill of particulars.
9-12-73	Hearing held - trial date set for Jan. 2, 1974 -- Carter, J.
9-18-73	All defendants- Filed Governments notice of motion for a re-hearing re disclosure
9-28-73	All defendants- Filed Governments affdvt. in support of above motion for a re-hearing.
9-28-73	All defendants- Filed Governments memorandum in support of Governments application to re-consider.
Nov. 7-73	LINDER-- Filed govts. bill of particulars.
Nov. 12-73	TURI--(atty. present)--deft. withdraws his plea of not guilty and pleads GUILTY to Count 1 only. PSI ordered. Sentence adj. to Jan. 15, 1974 at 9:30am. Bail contd. \$10,000. PRB Carter, J.
Nov 13 73	Filed transcript of record of proceedings, dated Sept. 12, 1973
Jan- 2-74	JAMES FENEY- Filed notice of appearance by Landas Rosen & Miller, Esqs. 110 E. 59th Street, NYC 10022 (Michael Miller of counsel) 832-0500
	Filed transcript of record of proceedings, dated Jan. 2, 74
Jan. 30-74	Filed for Govt. Motion to adjourn trial date.
Feb. 15-74	Filed for Deft. BADALAMENTE - Order -- Ordered that the records of Herbert Olsberg be produced in U.S.D.C. for S.D.N.Y. and it is further ordered that such records be produced prior to the trial of the above matter - Carter, J. (m/n)
Mar. 8-74	JAMES FENEY - Leave to file the within Rolle Prosequi is granted - Carter, J.
Feb. 28-74	ARTHUR VERABELLI (atty present) withdraws his plea of Not Guilty and PLEADS GUILTY to count 1 only. Pre-sentence report ordered. Sentence adj. to April 9-1974 at 9:30 A.M. in Room 519. Bail continued \$10,000 P.R.B. Carter, J.

DATE	A PROCEEDINGS
Mar. 4-74	JERRY ALLEN (atty present) withdraws his plea of Not Guilty and PLEADS GUILTY to count only. Pre-Sentence report ordered. Sentence adjourned without date. Bail continue \$15,000 P.R.B. - Carter, J. Sentence referred to JUDGE TYLER. CARTER, J.
Mar. 4-74	Jury Trial begun as to defts. SALVATORE THOMAS BADALAMENTE, LOUIS STERN AND HERBERT YAG (attys. present) Governments motion to dismiss count 2 as to deft. BADALAMENTE GRANT
Mar. 5-74	Trial continued.
Mar. 6-74	Trial continued Government rests
Mar. 7-74	Trial continued Deft. Badalamente Rests- Deft's Stern & Yagid Rests.
Mar. 8-74	Trial concluded - Jury Verdict as to Deft. BADALAMENTE GUILTY ON COUNT 1 STERN GUILTY ON COUNTS 1 & 2 YAGID GUILTY ON COUNTS 1 & 2 P.S.R. ordered. Sentence adjourned to April 11, 1974 at 9:30 A.M. in room 519. Bail continued as to all defts. - CARTER, J.
3-10-74	Filed Government's proposed Examination of Prospective Jurors.
	Filed Judgment(atty. present)
4-11-74	HERBERT YAGID -/It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, on count 1 and TWO (2) YEARS To run consecutively on count Bail Pending Appeal is granted and fixed in the amount of \$10,000 Personal Recogniza Bond unsecured. Bail limits are to cover the states of New York and New Jersey. CAR (copies issued)
4-11-74	LOUIS STERN - Filed JUDGMENT(atty present) It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE(5)YEARS, execution of sentence is suspended and the defendant is placed on probation for a period of FIVE(5)YEARS, subject to the standing probation order of this Court, pursuant to Title 18, United States Code Section 3651. Special condition of probation being that the defendant reside at a Community Treatme Center.--CARTER, J. (copies issued)
4-11-74	SALVATORE THOMAS BADALAMENTE - It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment of ONE(1)YEAR. Bail Pending Appeal is granted and fixed in the amount of \$10,000. Personal Recognizance Bond unsecured. Bail limits are to cover the states of New York and New Jersey - CARTER, J. (copies issued)
Apr-11-74	SALVATORE THOMAS BADALAMENTE- Filed defendants notice of appeal to the USCA for the 2nd Circuit from final judgment entered on 4-11-74 -- mailed copies to US Atty. and deft. address 244 Mc Elroy Ave., Fort Lee, N.J.
4-16-74	ARTHUR BARNABELLI - Filed JUDGMENT(atty. present) It is adjudged that the Imposition of is suspended, and the defendant is hereby placed on probation for a period of THREE (3) YEARS, subject to the standing probation order of this Court. Probation to begin following sentence imposed by John Motley. On deft's counsel's motion count 2 is dismissed with the consent of the Government. - CARTER, J. (copies issued)

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DATE

PROCEEDINGS

4-16-74 LEONARD TURI - FILED JUDGMENT (atty. present) It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO(2) YEARS Execution of sentence is suspended, and the defendant is placed on probation for a period of TWO(2) YEARS, subject to the standing probation order of the Court. On defendant's counsel's motion count 2 is dismissed with the consent of the Government. CARTER, J. (copies issued)

4-16-74 BERADELLI & TURI - Confidential & Sealed Envelope not to be opened except on order of the undersigned - So ordered - CARTER, J.

4-18-74 HERBERT YAGID - Filed Notice of Appeal to U.S.C.A. from the judgments of conviction dtd 4/11/74 (m/n)

4-23-74 HERBERT YAGID - Filed Notice of Motion and Order and Affidavits, returnable 4/24/74 at 12:30 P.M. Rm. 506, for an order granting permission for atty. of record to withdraw from the case relative to the transmission of the record on appeal and ordering the assigning of this matter to the Appeals Division of Legal Aid.

4-24-74 HERBERT YAGID - Filed ORDER re: Notice of Motion dtd 4/23/74 -- Ordered that atty. of record Paul P. Rao, Jr. is hereby permitted to withdraw from the processing of the appeal, and it further ordered - that the deft. case be assigned to the Appeals Division of Legal Aid subject to their approval. PIERCE, J. (m/n)

4-30-74 Filed Letter from USDC for the Dist. of N.J. dated Feb. 1, 74 to the Clerk of SD of NY. enclosed with Magistrate J.D. Schwitzer paper Re: Herbert Yagid.

4-30-74 Filed transcript of proceedings dated Mar. 4, 5, 6, 7, 8, 1974

4-30-74 Filed transcript of proceedings dated Apr. 10, 74

4-30-74 Filed transcript of proceedings dated Apr. 11, 74

5-1-74 Filed Original Record on appeal transmitted to U.S.C.A. 5/1/74

5-28-74 Filed transcript of record of proceedings dtd 3/4/74

5-28-74 Filed Transcript of record of proceedings dtd 1/2/74

6-5-74 HERBERT YAGID & LOUIS STERN - Filed Requests to Charge

6-5-74 HERBERT YAGID - Filed Stipulation deft's requests to charge be docketed as part of the appeal.

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6-7-74 HERBERT YAGID - Filed C.J.A. approving payment of Transcript of SDNY - Carter, J

6-5-74 HERBERT YAGID - Filed Supplemental record on appeal transmitted to U.S.C. this date.

Filed Transcript of proceedings, dated 6-5-74

6-14-74 HERBERT YAGID - Filed Notice of Motion returnable 6/21/74 for order extending the bail for deft. to continental U.S.

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PROCEEDINGS

- 6-19-74 TURI-Filed acknowledgment from District of Illinois
- 6-21-74 YAGID - Filed CJA 21 Authorization for Transcript from SDNY Court Reporters - Carter, (original mailed to AO Wash. D. C.)
- 7-3-74 YAGID- Filed memo endorsed on defendants motion to extend bail limits: The motion unopposed is granted. So ordered - Carter, J. m/n
- 7/10/74 Filed Transcript of record of proceedings, dated April 16, 1974
- 10-18-74 L. TURI--Filed papers origionally, filed with Magistrate Raby:
 (1) Docket Entry Sheet
 (2) Criminal Complaint, S.D.N.Y.
 (3) Disposition Sheet
 (4) Appointments of Counsel
 (5) Notices of Appearance
 (6) Temporary Commitment(s)
 (7) Appearance Bond(s)
- 10-18-74 A. Berardelli--Filed papers origionally, filed with Magistrate Raby:
 (1)Docket Entry Sheet
 (2)Criminal Complaint, S.D.N.Y.
 (3)Disposition Sheet
 (4)Appointments of Counsel
 (5)Appearance Bond (s)
- 10-18-74 L. Stern--Filed papers origionally, filed with Magistrate Raby:
 (1)Docket Entry Sheet
 (2)Disposition Sheet
 (3)Notices of Appearance
 (4)Appearance Bond(s)
- 0/21/74 J. Allen- filed CJA 20 approval for payment of fees of atty. Tyler, J. Mailed copies by CJA Clerk.
- 11/15/74 Filed true copy of mandate and opinion of the U.S.C.A. that the judgment of the District Court is affirmed as to appellant Salvatore Thomas Badalante but the judgment as to the appellant Herbert Yagid is reversed and that the action is remanded to said District Court for a new trial as to appellant Herbert Yagid accordance with the opinion of this Court. Clerk mailed notices.
- 21-75 JEROME ALLEN- filed JUDGMENT (atty. present) deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a period of FIFTEEN (15) MONTHS, -AND-the deft. is FINED \$4,000. Fine to be paid during the first year that the deft. is serving probation on indictment 74 Cr. 159 HRT, said probation to commence upon expiration of prison sentences imposed this day on indictments 73 Cr. 747, 74 Cr. 979 and this indictment, or the deft. is to be committed until the fine is paid or he is otherwise discharged according to law. Count two is dismissed on motion of deft.'s counsel with the consent of the Govt. The deft. is cont'd. on bail to 2/26/75 at 10:30AM, at which time he is to surrender to the custody of the U.S. Marshal. Tyler, J. issued all copies.

-cont'd. on next page-

D. C. 110 Rev. Civil Docket Continuation

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DATE	PROCEEDINGS
02-3-75	Filed deft. S. Badalamente's notice of motion re: extend surrender.
02-04-75	Filed Govt.'s affdvt. in response to motion re: extend surrender.
02-04-75	Filed memo-end. on motion of deft. Badalamente for extension of surrender... Motion denied. Carter, J. mn
03-19-75	Filed memorandum ...In short, the vouchers totalling in the above stated amount were arrived at by me after carefully balancing the conflicting problems heretofore briefly summarized. the Clerk is directed to place copies of this memorandum in the court file and to send forward a copy thereof together with copies of the vouchers to the Chief Judge of this Circuit for his consideration and approval. Tyler, J. mn (also in 73Cr747, 973, 74 Cr. 159, 979)
02-13-75	S. Badalamente- filed judgment & commitment, return deft. delivered to Fed. Det. Hdqtrs. N.Y.C. 2-3-75.
01-17-75	Filed letter from U.S.C.A. to Clerk of Court...the mandate issued to you on 12-12-74 should now be construed as applying to appellant S. Badalamente. F. Wooten Assistant Clerk
03-27-75	J. Allen- filed CJA 20 appointment of atty. Morton J. Turchin 60 E. 42nd St. NYC 10017 tele: Mo 1-0420. Tyler, J. mn mailed copies CJA Clerk.
03-27-75	J. Allen- filed CJA 20 approval for payment of fees of atty. Tyler, J. mailed copies CJA Clerk.
04-11-75	J. Allen- filed judgment and commitment, deft. delivered to: Federal Prison Camp 3-30-75.
04-30-75	Filed Govt.'s notice of readiness for trial. (H. Yagid)
5-5-75	Filed true copy of order of the U.S.C.A. that the petition of Salvatore Thomas Badalamente for writ of certiorari to the U.S.C.A. 2 Circuit is denied. Clerk mailed notices
05-19-75	Filed deft. S. Badalamente's notice of motion for reduction of sentence, etc.
05-21-75	Filed Govt.'s affdvt. in response to motion to reduce sentence of deft. Badalamente. Filed Govt.'s notice of motion to modify sentence
06-05-75	Reassigned from JUDGE CARTER TO JUDGE BRIANT. M/P
6-10-75	SALVATORE THOMAS BADALAMENTE- Filed MEMO ENDORSEMENT on Deft's Notice of Motion for reduction of sentence filed 5-19-75. MOTION DENIED, SO ORDERED--CARTER, J. (n/p)
6-27-75	JEROME ALLEN - Filed Gov't affdvt in opposition to deft's motion for reduction of sentence filed 6-2-75. (To Feb. 2nd 76)

(Cont'd on Page #8)

1 lh Transcript of Proceedings, dated June 20, 1975

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 - - - - - X

5 UNITED STATES OF AMERICA, :

6 vs. : 73 Crim. 471

7 HERBERT YAGID, :

8 Defendant. :

9 - - - - - X

10 June 20, 1975
10:00 a.m.

11 Before:

12 HON. CHARLES L. BRIEANT, JR.,

13 District Judge.

14 APPEARANCES:

15 PAUL J. CURRAN, ESQ.,
16 United States Attorney for the
Southern District of New York
17 MICHAEL EBERHARDT, ESQ.,
JOHN LUTZ, ESQ.,
18 Assistant United States Attorneys.

19 HERBERT YAGID, Pro se.

20 - - -

21 THE CLERK: United States of America v. Herbert Yagid.

22 THE COURT: Are you Mr. Yagid?

23 THE DEFENDANT: Yes, sir, I am.

24 THE COURT: Don't you have an attorney?

25 THE DEFENDANT: No, I have no attorney at the present

time, Judge.

THE COURT: Who represented you before?

THE DEFENDANT: At the time of trial, your Honor, I was represented by Paul Rao, Jr. Thereafter, because of my indigency, I was represented by the Legal Aid, the Appeals Division.

THE COURT: Federal Defender?

THE DEFENDANT: Yes, the Legal Aid, Appeals Division. After I won my appeal, the Trial Division decided that they wanted to have nothing to do with representing me, Mr. Mogel made that decision.

THE COURT: That sounds unlike Mr. Mogel --

THE DEFENDANT: I don't know how much you know about this matter --

THE COURT: I know nothing about it. I don't want to know anything about it which reflects unfairly on anybody.

THE DEFENDANT: It's history.

THE COURT: It may be history, but don't you think you ought to have a lawyer?

THE DEFENDANT: I am about to make an application, your Honor, to have a court appointed attorney and to also ask the Court to appoint me as co-counsel, give me co-counsel status in my matter.

THE COURT: What is your financial setup?

2 THE DEFENDANT: I recently filed with the Internal
3 Revenue Service -- may I submit this to you?

4 THE COURT: Don't submit anything to me unless I
5 need to have it. Just tell me, are you working?

6 THE DEFENDANT: No, I am not, sir.

7 THE COURT: What do you do?

8 THE DEFENDANT: I am completely indigent and I am
9 dependent upon the good graces and mercy of other people. I
10 have spent the last year of my life investigating a very im-
11 portant matter.

12 THE COURT: You mean you are not employed?

13 THE DEFENDANT: No, sir, I am not.

14 THE COURT: Are you getting public assistance?

15 THE DEFENDANT: May I explain something else? There
16 isn't much employment around for an attorney who has to go in
17 and say that he has been indicted, tried, convicted and
18 sentenced --

19 THE COURT: Are you a member of the bar?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: How are you supporting yourself now?

22 THE DEFENDANT: I just said to you before, your
23 Honor, I am sorry if I didn't make myself clear, I depend upon
24 other people, the good graces and mercy of other people who
25 know my circumstances.

1 lh

2 THE COURT: Will they pay for a lawyer for you?

3 THE DEFENDANT: No, sir, and I wouldn't ask them to.

4 That's going a little bit too far, with reference to anyone.

5 THE COURT: Is there any question about the man's
6 insolvency?

7 MR. LUTZ: Your Honor, apparently he did qualify in
8 the appeal stage for court appointed counsel. We have nothing
9 new to change that ruling.

10 THE COURT: I will direct the magistrate to assign
11 from the Criminal Justice Act panel. Is it really so that
12 Mr. Mogel won't continue with the matter?

13 THE DEFENDANT: YOur Honor, may I give you an
14 affidavit to that effect?

15 THE COURT: I will take your representation.

16 THE DEFENDANT: I will give you Mrs. Phyllis Bam-
17 berger's affidavit to that effect.

18 THE COURT: You need not do that. If it is a
19 representation, I am inclined to believe you. Is that so?

20 MR. LUTZ: We have no information one way or the
21 other.

22 THE COURT: I am going to direct the magistrate to
23 assign counsel from the Criminal Justice Act panel. I will
24 find that you are indigent for purposes of the Act. After you
25 have counsel, I will have a conference with you and I will

1 lh

2 discuss with you what your status will be insofar as --

3 THE DEFENDANT: I was about to ask you --

4 THE COURT: Wait. You are a lawyer, you know two
5 people can't talk at once.

6 THE DEFENDANT: I am sorry. I didn't realize you
7 weren't finished.. I apologize, your Honor.

8 THE COURT: I will discuss with you and your appointed
9 counsel when he is designated and I will discuss with you in
10 open court and on the record what the nature and extent of
11 your participation should be. It's been my practice generally
12 to permit defendants who feel strongly that they should have
13 the right to be heard some limited participation, providing
14 they discuss first with the attorney what they intend to say.
15 I found that works fairly well.

16 If you have been a lawyer, you know what the tra-
17 ditional view is about a lawyer who represents himself, who
18 he has for a client.

19 Is there anything we can take care of today in the
20 absence of having an appointed attorney? What counts are
21 open?

22 MR. LUTZ: Your Honor, my name is John Lutz. Both
23 counts are open still. This is a re-trial.

24 THE COURT: Of what defendants?

25 MR. LUTZ: Of Herbert Yagid, is the only defendant.

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2 THE COURT: Just this defendant?

3 MR. LUTZ: Yes.

4 THE COURT: There is some kind of a motion pending
5 also by Jerome R. Allen?

6 MR. LUTZ: Mr. Allen, I believe --

7 MR. EBERHARDT: Your Honor, I might address myself
8 to that. Michael Eberhardt appearing on behalf of the govern-
9 ment. I received a motion in the form of a letter from Mr.
10 Allen, making a motion for a reduction of sentence. Mr. Allen
11 was sentenced not only in conjunction with this case, but
12 also by three or four other cases handled by the United States
13 Attorney's office.

14 Mr. Ira Sorkin, Assistant United States Attorney in
15 this District, is preparing, as I understand it, a response
16 to Mr. Allen's motion for reduction of sentence. I will con-
17 sult with him later on today and make sure that your Honor
18 gets a copy of those papers.

19 THE COURT: Are there any pre-trial matters besides
20 getting counsel that I can address myself to at this time?
21 I don't want to make any definitive rulings, I don't want to
22 make any final rulings in the absence of an attorney.

23 MR. LUTZ: This is a re-trial, as I stated, but if
24 the defendant or his counsel, when appointed, would like to
25 listen to the tapes that they heard at the original trial, we

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2 would be happy to make them available.

3 THE COURT: There are tapes?

4 MR. LUTZ: There are tapes.

5 THE COURT: Is there a reported decision in the Court
6 of Appeals?

7 THE DEFENDANT: Yes, your Honor.

8 THE COURT: What was the ruling in the Court of
9 Appeals?

10 MR. EBERHARDT: The ruling in reversing Mr. Yagid's
11 conviction dealt with the duty of the Government to turn over
12 Brady material with respect to one witness. In fact, Mr.
13 Jerome Allen appeared as a Government witness. The Court
14 ruled on certain letters Mr. Allen sent to Mr. Sorkin and
15 certain other government officials and was not turned over that
16 it was Brady material.

17 THE COURT: Brady material or 3500 material?

18 MR. EBERHARDT: We argued at the Court of Appeals
19 level that we thought it was 3500 material. The Court of
20 Appeals felt it was Brady material. I don't think it makes a
21 whole lot of difference at this point.

22 THE COURT: Are you going to have Allen as a wit-
23 ness?

24 MR. EBERHARDT: We have not decided yet. We hope to
25 make a determination within the week. If it appears we are,

we will abide by the Court of Appeals determination as to that being Brady material and will make those letters immediately available. I think Mr. Yagid has those letters already.

THE COURT: I am sure he must.

MR. EBERHARDT: From the Court of appeals. I will make sure that he has all of them, if Mr. Allen is going to be a witness.

THE COURT: What is the time schedule under the rule? When was the remand filed, in order to comply with the Drummond case and the rule about re-trials?

THE DEFENDANT: Your Honor, were you addressing me, sir?

THE COURT: I am really addressing both of you. I just as soon let the Government respond. If you don't agree with them, you can speak up.

THE DEFENDANT: I was waiting my turn. I have a lot to say.

THE COURT: What do you want to say?

THE DEFENDANT: On this particular point?

THE COURT: Yes.

THE DEFENDANT: On this particular point, which I am taking out of context in the presentation that I was going to make, under the Southern District Plan, Section 6 mandates that in the event of a reversal or ruling by the District

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2 Court, that is an appellate reversal or a ruling by the Dis-
3 trict Court reversing a decision or a trial matter, that the
4 new trial shall commence at the earliest practicable time,
5 reading the text, your Honor, "but, in any event, not later
6 than 90 days after the finality of such order, unless extended
7 for good cause" --

8 THE COURT: What is the date? That's what I am
9 asking. Ninety days from what day?

10 THE DEFENDANT: The order date was November 21,
11 1974. The mandate day was December 12, 1974. The Government
12 did not serve their notice of readiness for trial I think
13 until May 5. Mr. Lutz might --

14 THE COURT: May 5, notice of readiness?

15 MR. EBERHARDT: Your Honor, that is correct. Maybe
16 a little -- I am sure your Honor is aware of the reassignment
17 -- perhaps your Honor isn't aware of the reassignment problem
18 in this case. Judge Carter tried the case initially and it
19 went back to him, of course, after the Appeals Court reversed
20 the case.

21 The instruction from the Court of Appeals was that
22 Judge Carter should not be the trial court judge to preside
23 over the second trial. Judge Carter then submitted it to the
24 Court's reassignment committee. It came upon Judge Tyler's
25 trial calendar. Unfortunately, it came at a time when I guess

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2 Judge Tyler was contemplating his departure to take his
3 position as Deputy Attorney General --

4 THE COURT: I don't mean to interrupt you unnecessarily,
5 but I have a memorandum from the case processing section dated
6 June 4, 1975 assigning this case to me, and it says it is a
7 reassignment of criminal case presently charged to Judge
8 Carter.

9 MR. EBERHARDT: Your Honor, I am certain that it
10 was on Judge Tyler's calendar because we were trying to deal
11 with Judge Tyler and his court clerk.

12 THE COURT: His cases were reassigned in March.

13 MR. EBERHARDT: That's right, your Honor. That is
14 why we kept getting no response from Judge Tyler's chambers.

15 THE COURT: What is the date on which the order be-
16 came final?

17 MR. EBERHARDT: The mandate from the Circuit?

18 THE COURT: Yes.

19 THE DEFENDANT: December 12.

20 MR. EBERHARDT: I believe that's a correct date, yes,
21 your Honor.

22 THE DEFENDANT: Mr. Eberhardt just alluded to the
23 fact that they had some problem with Judge Tyler. Judge Tyler
24 in fact in a possibly blossoming Congressional investigation
25 into this matter -- I say possible -- the question of Judge

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2 Tyler's conduct --

3 THE COURT: Look, let's not --

4 THE DEFENDANT: Your Honor, I am not --

5 THE COURT: You will have an attorney. You are being
6 your own representative here, and it is unfair to you. So be-
7 fore you get off on a tangent, sit down a minute and let me ask
8 Mr. Eberhardt how he rationalizes the expiration of the time
9 between December 12 and today.

10 THE DEFENDANT: May I say one thing, your Honor?

11 THE COURT: Very briefly, in your own interests.

12 THE DEFENDANT: I understand. Judge Tyler was aware
13 of this matter by his language in his discussion in his cases,
14 as well as many other matters, all during the period that Mr.
15 Eberhardt was alluding to before when he said we had trouble
16 with reference to the reassignment. Thank you.

17 MR. EBERHARDT: Your Honor, beginning well within
18 the 90-day period starting from December 12 I began calling
19 Judge Carter's chambers and his court clerk to see if reassign-
20 ment had been done pursuant to the direction of the Court of
21 Appeals. Apparently it hadn't been done when I first started
22 calling. I finally succeeded in talking with I think Mr.
23 Burghardt, the District Court Clerk. He informed me that the
24 matter was before the reassignment committee.

25 THE COURT: That committee, you know, meets from 3

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2 to 5 times a week. Matters do not stay in that committee.

3 The whole Tyler docket was reassigned under my personal obser-
4 vation in one afternoon, and all the notices went out the next
5 day. That took place, I am certain, in March. That's my best
6 recollection.

7 MR. EBERHARDT: Are you referring to Judge Tyler's
8 cases, your Honor?

9 THE COURT: Yes. This did not come to me as Judge
10 Tyler's case. This comes to me by a June 4 memorandum which
11 you are welcome to look at which advises me that it's been
12 reassigned from Judge Carter.

13 MR. EBERHARDT: Your Honor, the only thing I can
14 say --

15 THE DEFENDANT: I have some knowledge --

16 THE COURT: It also says included in that, defendant
17 Jerome Allen is making a motion to reduce his sentence and
18 was also assigned to Judge Tyler. The notice indicates Allen
19 was assigned to Judge Tyler. As far as Mr. Yagid is concerned,
20 he is coming to me directly from Judge Carter's docket. The
21 notice says so.

22 THE DEFENDANT: Your Honor, may I help the Court and
23 Mr. Eberhardt on this matter? I have spent a year investiga-
24 ting this matter, and I will cut it very short and pointed and
25 make it only with reference to what you were just discussing,

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2 your Honor. Up until a couple of weeks ago this matter -- and
3 every time I looked at this particular file, 43 Cr. 471 --

4 THE COURT: 73.

5 THE DEFENDANT: I am sorry, what did I say? 73 Cr.
6 471. I am sorry. That's what I meant to say. This file was
7 in Judge Tyler's cabinets in Section 5 or Unit 5. When his
8 cases were reassigned, I went in one day, that is unknowing
9 that they had been reassigned, a short time ago, and wanted to
10 look at the file once again.

11 I was told, I don't know the young man's second
12 name, by the fellow Bob in Unit 5 that the case had been re-
13 assigned to Judge Carter. I said that's impossible pursuant
14 to the Court of Appeals ruling. I then went and spoke to Unit
15 5 who called it to the attention of the gentleman who was in
16 charge of that whole section.

17 THE COURT: That could be. You see, it might have
18 been reassigned to Judge Carter --

19 THE DEFENDANT: By mistake.

20 THE COURT: No, not by mistake. By the luck of a
21 draw.

22 THE DEFENDANT: That's not what I was advised, sir.

23 THE COURT: It can't be by mistake because they pull
24 a card out of a wheel. You have seen it done.

25 THE DEFENDANT: I can only tell you what I was told.

2 THE COURT: Let me hear Mr. Eberhardt on the question
3 of time.

4 MR. EBERHARDT: The only thing I can do for the Court
5 is to go to Mr. Burghardt and get the schedule, because he is
6 the individual who is conferring with me.

7 THE COURT: I think Mr. Yagid states it correctly,
8 that probably this case was reassigned by random selection to
9 Judge Carter who after all has one chance out of 24 of receiving
10 any particular case. After it happened, someone, apparently
11 the defendant, called the attention of the Clerk's Office to the
12 fact that because of the prior determination of the Court of
13 Appeals, this was inappropriate.

14 It seems to me as if the 90 days has long since passed
15 and that unless some particular showing should be made, Mr.
16 Yagid ought to have an opportunity to consult with counsel,
17 following which I think there is a prima facie basis for a
18 dismissal here.

19 MR. EBERHARDT: Your Honor, I will have to look into
20 the law itself with respect to retrials, but the Government did
21 file a notice of readiness, of course, in the first instance,
22 and there is nothing to indicate after the reversal by the
23 Court of Appeals that we would not be ready to retry the case
24 as soon as the Court could put it down for trial, whichever
25 Court --

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2 THE COURT: May 5 is more than the 90 days following--

3 MR. EBERHARDT: Your Honor, I was motivated to file
4 that because I could never get a response from either Judge
5 Tyler's or Judge Carter's chambers as to who had the case.

6 THE COURT: I will make an inquiry into the situation
7 here. I think the first step is for Mr. Yagid to be taken
8 immediately to the magistrate and have an attorney assigned
9 to him from the Criminal Justice Act panel. I want you to get
10 the name and address of that attorney and make yourself
11 available to him to disclose everything to him, particularly
12 beginning with this question of the 90-day period. That's a
13 threshold issue.

14 Unless that could be resolved, there is no need for
15 any attorney sitting and listening to the tapes. It won't be
16 significant to him. We have a threshold issue.

17 I'd like to have you come back in a week or ten days
18 to discuss that point further with the new attorney present.

19 MR. EBERHARDT: That's fine with me.

20 THE COURT: The clerk is busy. Can you go to the
21 magistrate --

22 THE DEFENDANT: I will do that.

23 THE COURT: Ordinarily I would send a clerk with
24 you, but you are an attorney --

25 THE DEFENDANT: I never had anything to do with

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2 criminal matters or the criminal courts until a couple of
3 years ago. I had a general practice, but I had nothing to do
4 with criminal law or domestic relations law, your Honor.
5 Everything but.

6 THE COURT: You missed nothing. But you will have
7 an attorney. Cooperate with him and don't try to be a lawyer.

8 THE DEFENDANT: Your Honor, the reason I asked for
9 co-counsel status was a very definite no. I have gone
10 through some very terrible and tragic experiences in my life
11 because I had to --

12 THE COURT: Not today.

13 THE DEFENDANT: One other thing. In addition to the
14 motion relative to the Southern District plan to expedite
15 criminal matters, there is another motion in mind with reference
16 to having this case also considered for dismissal based upon
17 the conduct of the Government and the various representatives
18 of the Government under the Ellsberg, Coscanino, etc., etc.,
19 rulings, I would go down the whole list, your Honor.

20 THE COURT: Please understand that if the case does
21 not go out under the 90-day rule, any such motion will require
22 the Court's consideration and it may require a hearing and it
23 may delay your trial.

24 THE DEFENDANT: I understand that. I was going to
25 call your Honor's attention to the fact that because of the

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2 tremendous investigative nature of an entry by a new attorney
3 to this matter, it might take some time --

4 THE COURT: Let him tell me that. Don't you try to
5 say that. Let him tell me that.

6 THE DEFENDANT: I agree with you.

7 THE COURT: I think you should come back 4 o'clock
8 on July 2.

9 THE DEFENDANT: At that time the co-counsel status
10 matter will be taken up also, am I right? Is that what you
11 said before, your Honor?

12 THE COURT: I didn't really say that. Anything
13 that is before the Court will be taken up, if possible. I
14 have told you my reaction as to how this should be handled.
15 If it isn't satisfactory, I will discuss it further with your
16 attorney. This whole thing comes to me cold, and I know nothing
17 about it, I didn't even read the Court of Appeals opinion. But
18 I can tell right now that if you are not careful, before this
19 case is over you are going to put your foot in your mouth.

20 Use the services of your lawyer. I am not cutting
21 you off. If you want to talk, you can talk. But don't. Stick
22 to the things that are important. I know what it's like. All
23 right, July 2 at 4 o'clock. You are continued on your existing
24 bail until then. Go with these gentlemen now to the magistrate.
25 The clerk will telephone and tell them you are coming.

Transcript of Proceedings, dated July 2, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA, :

vs. : 73 Cr. 471

HERBERT YAGID, :

Defendant. :

-----x

Before:

HON. CHARLES L. BRIEANT, JR.,

District Judge.

New York, July 2, 1975,
4:00 p.m.

APPEARANCES:

PAUL J. CURRAN, ESQ., United States Attorney,
For the government:

By: Michael Eberhardt, Esq.,
John Lutz, Esq., Assistant United States
Attorneys

HERBERT YAGID, Pr Se.

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2 THE CLERK: United States of America
3 against Herbert Yagid.

4 THE COURT: Gentlemen, there has been
5 somewhat of a problem arose in this case. As the court
6 understands it, the random selection by which they
7 select an attorney to represent an indigent defendant
8 from the Criminal Justice Act panel drew out the name
9 of Mr. Wales and, as I understand, the attorney whose
10 name was drawn couldn't act or felt he shouldn't act
11 because of some prior acquaintance that he had with a
12 co-defendant.

13 Do I state that correctly?

14 MR. YAGID: Excuse me, sir. I feel it
15 was somewhat more complicated than that. But what
16 you are saying is correct.

17 MR. EBERHARDT: I am sorry to interrupt,
18 your Honor. My understanding was Mr. Wales was the
19 second attorney that was approached with respect to
20 taking this case because I received a phone call --

21 MR. YAGID: Third.

22 THE COURT: Who were the others?

23 MR. YAGID: The first one was a gentleman
24 by the name of David Keegan, who is all the way out on
25 Long Island, and when I spoke to him we mutually agreed

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2 it would be rather inconvenient and -- he used the
3 word, not I, sir -- ridiculous that he should represent
4 me from out there when I reside in New Jersey. So
5 by agreement we decided to send me back to Mrs. Cam-
6 panella.

7 THE COURT: And Mrs. Campanella then drew
8 someone else on trial.

9 MR. YAGID: Edward Panzer. He was on
10 trial.

11 I made a request through an associate of
12 his to see him Friday, late that day, or over the week-
13 end. He had to go away to the country over the
14 weekend.

15 I therefore asked Mrs. Campanella to draw
16 further, which she did, and she then drew the name of
17 H. Elliot Wales, whom she informed me that when she spoke
18 to him he told her coincidentally he had known about
19 the case because of prior representation of one of the
20 former defendants on appeal.

21 THE COURT: He wrote a letter which in
22 plain language could be characterized as begging off,
23 and I think his letter states a legitimate purpose and
24 I think, to complete the record, I ought to tell you
25 that my law clerks have been working with Mrs. Campanella

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1 attempting to find somebody else to come in or even
2 possibly to get Mr. Panzer to come in after the trial
3 day was finished with Judge Lasker.
4

5 We haven't been able to find a lawyer.
6 There is no question you are entitled to a lawyer.

7 I notice further you are an intelligent,
8 educated person and you have a law degree although no
9 experience in the criminal law.

10 What comes to my notice directly here is
11 this: It seems to me that you have a very good motion
12 under Rule 5 of the presently existing plan for prompt
13 disposition of cases and I think there is really no
14 reason why I ought not address myself to that because
15 if there is merit in it, and there certainly seems to
16 be superficially, granting that motion would put out
17 of issue the apparently difficult problem of finding
18 you an attorney.

19 I am perfectly willing to hear from the
20 government right now why such a motion ought not to be
21 granted.

22 MR. YAGID: May I respond before you
23 give the government the opportunity, without being
24 discourteous, if you agree, sir?

25 THE COURT: Certainly.

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2 MR. YAGID: I am going to take the
3 liberty -- I hope I don't incur the wrath of the court
4 but I would like to explain something to this honorable
5 court. I know about this motion. I am fully aware,
6 I have done some research -- some research -- because
7 of the fact I spent a year investigating this case.

8 THE COURT: It is not a difficult motion.
9 It is very simple.

10 MR. YAGID: I know, your Honor. I
11 would love if you would let me explain something to you
12 and maybe you can understand my thinking.

13 THE COURT: Give me the bottom line first.

14 MR. YAGID: The bottom line is very simply
15 this. It's akin to a white man telling a black man,
16 "I understand how you feel." As far as I am concerned,
17 your Honor, there is no white man who was ever born that
18 could tell a black man that he knows how he feels.

19 The analogy I am drawing is this, your
20 Honor. I stood indicted, tried, convicted and sen-
21 tenced before a judge knowing that I was innocent.
22 That was trying enough. But there came a more trying
23 experience in my life when I realized -- when the in-
24 formation and knowledge came to me that the people who
25 did this to me had prior knowledge of my innocence. I

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2 therefore am not satisfied with what I consider a pyrrhic
3 victory under this rule which, as far as I am con-
4 cerned, was led to happen. I am seeking --

5 THE COURT: Let to happen by whom?

6 MR. YAGID: I want to withdraw that, your
7 Honor.

8 THE COURT: You don't mean by me?

9 MR. YAGID: By you, sir?

10 THE COURT: Who could let it happen?

11 MR. YAGID: The government, sir.

12 THE COURT: I don't think the government
13 controls --

14 MR. YAGID: You were never near this case.
15 How do I dare mean you.

16 THE COURT: I don't think the government
17 controls the docket. My record here is this case
18 was assigned to me on June 5, 1975, and I believe that you
19 were here before me for a pretrial conference on June
20 20th. So I consider that reasonably prompt.

21 MR. YAGID: Your Honor, it so happens
22 that the mandate date was December 12th. I had my
23 own reason for waiting --

24 THE COURT: Let's have the record be
25 correct. The clerk's office indicates that the mandate

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2 was filed in this court on December 16th. I am not
3 cutting you off, but I think it might be helpful if I
4 went over these matters with you. The case was then
5 returned to the docket of Judge Carter of this court.

6 On April 30, 1975 the government filed a
7 notice of trial readiness with Judge Carter, and
8 Judge Carter thereafter, under date of May 23, 1975,
9 memorialized the assignment commitment and he said in
10 his memorandum to the Assignment Committee in sub-
11 stance that he had just received a notice of readiness
12 for trial on or after May 5th and he referred to the
13 citation 507 F. 2d, page 12, and then he noted that
14 the case had not yet been reassigned and requested
15 that it be reassigned without delay.

16 The memorandum from Judge Carter must
17 have reached the Assignment Committee some time between
18 May 23rd and June 4th, because on June 4th they acted,
19 or at least on that date they instructed the clerk,
20 and on June 5th I was reassigned.

21 So that's your chronology. If you take
22 issue with any of that, you may.

23 MR. YAGID: I have to take issue because
24 I happen to know the facts which were not made avail-
25 able to you, sir, which of course in no way questions

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2 anything you have said.

3 THE COURT: Which dates are wrong?

4 MR. YAGID: When this case came down it
5 went to Judge Tyler's files in Unit 5 -- Unit 2; I'm
6 sorry. Whichever unit is Judge Tyler's.

7 THE COURT: You are talking about No.
8 471.

9 MR. YAGID: It remained there, your Honor,
10 until such time as the fellow by the name of Bob --
11 and I don't remember his second name -- who is the
12 gentleman who takes care of the criminal matters in
13 that unit, had it sent over to Judge Carter's unit.
14 I then spoke to the gentleman because of the fact that
15 I knew that the Court of Appeals' opinion had said
16 that this case would be reassigned to any judge but
17 Judge Carter.

18 I went to the head of the -- I forget his
19 name, the gentleman's name -- but the head of the
20 record unit and I advised him of this, and he said he
21 would take it up and have it sent to the Reassignment
22 Committee for reassignment, if I knew what I was talking
23 about, and that is how it got out of Judge Carter's
24 hands.

25 THE COURT: That couldn't be, because only

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2 a judge can submit something to the Assignment
3 Committee for reassignment.

4 I want to go one step further because my
5 records don't show the matter as having been assigned
6 to Judge Tyler at any time between the date of the
7 mandate and the date that it came to me. But be
8 that as it may, you are here basically without repre-
9 sentation. You say you don't want a pyrrhic victory,
10 as you describe it, of this motion being granted
11 and that is perfectly all right with me. What I
12 would like to do in that circumstance --

13 MR. YAGID: I didn't finish.

14 THE COURT: If you don't want the motion
15 granted --

16 MR. YAGID: I would appreciate if you would
17 let me finish so I can complete my thought.

18 THE COURT: All right.

19 MR. YAGID: I want to make a combined mo-
20 tion. I want to make a motion under Rule 6 of the
21 Southern District plan to expedite criminal causes, and
22 at the same time make a motion to dismiss based upon
23 the conduct of the government in this matter from the
24 beginning. In other words, I want a double-headed
25 motion, a two-based motion.

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2 THE COURT: If you are going to do that you
3 ought to have an attorney, because, you see, a two-based
4 motion, first, I might not take. I might decline
5 as a matter of discretion to take the second half of
6 the motion if the first half is good, and it might well
7 be good. If the first half is good, I don't have to
8 reach the question of the second half. And it is
9 getting more complex when you have that. So on
10 those complexities, then it is through no fault of your
11 own you have no attorney here today and the court
12 ought to provide you with an attorney, and after you
13 and he have conferred, then I will take up the whole
14 matter.

15 But as far as taking a two-part motion
16 from you when you are unrepresented --

17 MR. YAGID: I will tell you what. May
18 I make it easy for you? I will tell you two things --
19 I will suggest it to you -- I don't tell this court
20 anything. I say that respectfully, your Honor.

21 THE COURT: All right.

22 MR. YAGID: No. 1, just as a matter of
23 record, and then I will give you the determination I
24 have made on this spot, which I think will please you,
25 but just to correct the record, the docket sheets will

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2 show that this case was assigned to Judge Tyler and
3 laid in Judge Tyler's files. I have photocopies of
4 those docket sheets.

5 THE COURT: I will send for them.

6 MR. YAGID: I can produce them for you.

7 THE COURT: I will send for them.

8 MR. EBERHARDT: I don't mean to interrupt,
9 but once the government is given an opportunity, I can
10 explain how part of this case ended up with Judge
11 Tyler.

12 THE COURT: Attempting to save time, I
13 have interrupted more than I ordinarily would in a
14 matter of this kind.

15 The point I am making is he is entitled to
16 counsel. If there is some simple matter which can
17 be resolved to everyone's satisfaction, including his,
18 without him having counsel, then I would go forward
19 today. But if that is not his wish, and he indicates
20 to me maybe it is not, but I haven't let the man finish
21 so I am not sure, then I am going to do nothing today
22 except to defer the matter until such time as you can
23 have assigned counsel.

24 I would like to get to the bottom of the
25 chain of assignment here and be certain as to the

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2 dates. That I would like to get. I think I will
3 send for the docket sheets.

4 MR. YAGID: I don't want to incur your
5 wrath.

6 THE COURT: You haven't. Do you find
7 me being impatient with you? Because I don't so con-
8 sider it. I am not going --

9 MR. YAGID: You threw me out of your
10 office the other day.

11 THE COURT: True, because I can't have
12 you in my office making ex parte statements to my
13 secretary and I asked you politely to leave, I didn't actual
14 physically throw you out.

15 MR. YAGID: I didn't say you physically
16 threw me out.

17 THE COURT: If there is something complex
18 here which is important to you, the court should only
19 proceed when all the facts are certain and when you
20 have legal representation.

21 MR. YAGID: Despite the fact that at
22 this moment if I wished I could insist upon representing
23 myself --

24 THE COURT: You wouldn't be foolish enough
25 to do that, would you?

1
2 MR. YAGID: Under Court of Appeals cases
3 in this circuit --

4 THE COURT: There are such cases.

5 MR. YAGID: -- the Court of Appeals, Second
6 Circuit, Dougherty --

7 THE COURT: Don't give them to us.

8 MR. YAGID: The judge is aware of it.
9 And yesterday's Supreme Court decision, which decided
10 that any defendant has a right to defend himself if he
11 so chooses, I am not about to indulge in any such
12 conduct. I am going to ask just one thing of this
13 court and then I will submit on my own a motion and get
14 rid of this whole thing for the purposes of getting it
15 off the court's calendar.

16 May I make this particular request first?

17 THE COURT: Yes, certainly.

18 MR. YAGID: Then I am going to advise
19 the court that I will make a Rule 6 motion under the
20 Southern District plan for expediting criminal cases.

21 On the 28th of May, 1975 the Hon. William
22 H. Mulligan, Circuit Court Judge for the Second Circuit
23 Court of Appeals, granted me an order which I would
24 like to read the bottom line to you:

25 "Upon consideration thereof, it is ordered

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2 that said motion be and it is hereby granted that a
3 transcript of said tape shall be supplied to Herbert
4 Yagid at his expense."

5 The tape in questions, sir, this is my
6 own statement, the tape in question was a transcript
7 of the tape of the Court of Appeals proceedings.

8 I had consulted with the clerk of the Second
9 Circuit Court, who consulted with the administrative
10 judge, who then referred the matter to Judge Mulligan,
11 who was the senior member of the three-panel court
12 that heard this appeal. Based upon my letter and
13 the information that was passed on, Judge Mulligan
14 granted this unusual motion in order to provide me
15 with a transcript of the tape of that argument on
16 appeal.

17 He of course at that point did not --
18 could not make a determination and did not make a de-
19 termination of my indigency. I would appreciate
20 it if this court would take note of Judge Mulligan's
21 order and take judicial notice and grant me, because
22 of my indigent position, the obtaining of the tran-
23 script of the Court of Appeals tape.

24 THE COURT: How much would be involved
25 in this?

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MR. YAGID: Excuse me.

THE COURT: How much money?

MR. YAGID: I have no idea, your Honor.

THE COURT: If it was a short argument
and it is not a very large amount of money --

MR. YAGID: May I tell you why Judge
Mulligan granted this?

THE COURT: I assume because he thought
he ought to grant it. I am not here to question
Judge Mulligan's decision. I assume he did the
correct thing in ordering it.

MR. YAGID: Yes. I imagine you would
without question. But he determined that the question
of indigency should be determined in the lower court,
meaning at the District Court level, which is where I
am right now, and therefore I would most respectfully
appreciate, and I submit -- and I submit in all
honesty and sincerity -- the fact that it is extremely
important that I be provided with this transcript.

Now I will take it out of the realm of
the District Court business and off the District Court
docket by making the motion which you suggested before.
That will suffice and satisfy me, sir, and if it will
satisfy you I will thereupon forgo making any other

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2 motion within this jurisdiction.

3 THE COURT: Tell me what is necessary for
4 having a transcript of the Court of Appeals' oral
5 arguments under the Criminal Justice Act?

6 MR. YAGID: May I discuss that with you
7 in camera?

8 THE COURT: I really prefer not to.
9 Give me a capsulated idea.

10 MR. YAGID: It may jeopardize criminal
11 investigations.

12 THE COURT: Criminal investigations are
13 supposed to be made by law enforcement officials.

14 MR. YAGID: That's right, your Honor.

15 THE COURT: They have plenty of money.

16 MR. YAGID: That's the funny part about
17 this whole thing.

18 THE COURT: They have plenty of money to
19 buy tapes.

20 MR. YAGID: Indigent people do not.

21 THE COURT: How much is involved in money?

22 MR. YAGID: I honestly don't know. Maybe
23 they have a copy of it.

24 MR. EBERHARDT: We don't have a copy. I
25 was present for oral argument, and to my recollection

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2 oral argument did not last for more than a half hour.

3 THE COURT: Let me think about that a mo-
4 ment and I will come back to you.

5 MR. YAGID: With reference to the necessity
6 of it, I will make --

7 THE COURT: If you show the necessity
8 of it pertaining to you, I would have no hesitancy at
9 all in ordering it. There are a couple of other
10 factors to consider here. It may not cost a lot of
11 money. We don't know what the order of magnitude
12 of the cost is. Secondly, we don't know whether
13 the government intends to continue to treat you as
14 some kind of a target or not. And, of course, the
15 other thing we don't know is we don't know any basis
16 for need of it at public expense if you are not a
17 target. You are not a private attorney again.

18 MR. YAGID: May I answer that?

19 THE COURT: Hold that in abeyance and
20 let me hear what they have to say for a moment.

21 MR. EBERHARDT: Your Honor, I am going
22 to give a chronology that really has two prongs to it
23 so I may take a few moments, but I ask the court to
24 bear with me.

25 The docket sheet reflects, as your Honor

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18

2 is aware, that the mandate was listed on the District
3 Court docket sheet December 16, 1974.

4 THE COURT: Yes.

5 MR. EBERHARDT: The government, myself
6 in this case would be the government because I did all
7 the work with respect to the followup of the reversal,
8 the government in this case having not heard from Judge
9 Carter's chambers with respect to the reassignment of
10 this case, as was required by the Second Circuit, began
11 to call Judge Carter's chambers in late February
12 and early March of 1974 -- excuse me -- 1975, within
13 90 days of the December 16, 1974 mandate.

14 My diary, my personal diary, indicates
15 some phone calls to Mr. McCullough, who was the court
16 clerk for Judge Carter. In fact, in a conversation
17 that Mr. Aronwald of my office had with somebody in
18 Judge Carter's chambers last week, they indeed have
19 a recollection that I was up bothering them some
20 time during the period of early March, 1975, and I
21 believe they have also a recollection that I was con-
22 cerned at that time about compliance with the 90-day
23 rule.

24 THE COURT: The ordinary practice in making
25 that type of communication would be to write a letter

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2 with a copy to adverse parties or make a motion or re-
3 quest a pretrial conference on the record in the court
4 with the defendant and his attorney present. All
5 I can tell you about it is that I agree with you on
6 the December 16th date that the Court of Appeals mandate
7 was filed in this court, and I previously mentioned that
8 on April 30th you filed a notice of trial readiness
9 which you really didn't have to do under the rule, but
10 under date of March 23, 1974 Judge Carter wrote a
11 memorandum to the Assignment Committee.

12 MR. EBERHARDT: Is that May 23rd?

13 THE COURT: Yes.

14 MR. EBERHARDT: You said March.

15 THE COURT: He therein states that the
16 case has not yet been reassigned and he would suggest
17 that the reassignment proceed without delay.

18 As I pointed out to you earlier, or I
19 pointed out to Mr. Yagid earlier, the Assignment Com-
20 mittee acted at least by the 4th of June with re-
21 spect to that and on June 5th the matter was assigned
22 to me and I sent for it promptly, with the result that
23 you were in here on the 20th of June and at that time
24 there was no attorney for the defendant and there wasn't
25 very much done on that date.

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2 I must disclaim the statement that at any
3 time this case was the responsibility of former
4 Judge Tyler. However, I don't think it makes any
5 difference.

6 MR. EBERHARDT: If I could finish with
7 my entire chronology, I may put this in perspective.

8 I did in fact call Mr. McCullough and ad-
9 vised him of the problem --

10 THE COURT: He being who?

11 MR. EBERHARDT: Judge Carter's court
12 clerk.

13 Mr. McCullough advised me he would take it up
14 with the judge and that the matter would be taken care
15 of.

16 I had previously called Mr. Sexton,
17 who is the individual in the clerk's office of this
18 district to find out whether or not in fact the case
19 had been reassigned, and he told me it was not.
20 That is what prompted my call to Judge Carter's cham-
21 bers. He advised me a call to chambers would be the
22 most expeditious way of handling it.

23 Having waited a few days and upon Mr.
24 McCullough's representation that the matter would be
25 taken care of, I called the clerk's office again, and

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2 I recall asking them what was the status of Indictment
3 No. 73 Cr. 471, the instant indictment. I was
4 advised that the matter was now before Judge Tyler.
5 However, what I was not advised was that the only part
6 of this case that was before Judge Tyler was the
7 sentencing of Jerry Allen.

8 THE COURT: Jerome Allen?

9 MR. EBERHARDT: Yes. That in fact ac-
10 counts for what Mr. Yagid already told the court, that
11 is, that the docket sheet was in Judge Tyler's unit for
12 a period.

13 THE COURT: Judge Carter had referred the
14 sentencing of Mr. Allen to Judge Tyler with the con-
15 sent of Mr. Allen and the government.

16 MR. EBERHARDT: That is correct.

17 THE COURT: And because of the fact Mr.
18 Allen had other indictments which Judge Tyler already
19 had. The consensus of opinion was that the man ought
20 to be sentenced on all of his indictments by one judge,
21 which is certainly a reasonable request.

22 MR. EBERHARDT: Certainly. That is why
23 when Mr. Sexton, or whoever it was in the clerk's
24 office, told me 73 Cr. 471 was with Judge Tyler it
25 didn't surprise me, because I knew he already part of

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2 the case.

3 I then began calling Judge Tyler's cham-
4 bers to find out what the status of this case was.
5 They told me they had no knowledge of it.

6 THE COURT: No knowledge of Mr. Yagid?

7 MR. EBERHARDT: That's correct.

8 I again called back the clerk's office.
9 They advised me -- again I only alluded to 73 Cr. 471, not
10 understanding they had already differentiated Mr.
11 Allen from Mr. Yagid's part of the case -- and the
12 clerk's office again told me they had the case
13 listed for Judge Tyler.

14 What happened was then I got back to Judge
15 Tyler's chambers, because I had another case pending
16 before Judge Tyler, to learn all his cases were then
17 being reassigned.

18 THE COURT: That must have been at the
19 end of March.

20 MR. EBERHARDT: My recollection is mid-
21 or end of March.

22 Judge Tyler, when he learned he was under
23 consideration for a federal appointment, stopped hearing
24 any cases in which the government was a party.

25 About a week or so later the committee began

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2 reassigning his cases and did so rather promptly, so
3 that by the 1st of April practically all of Judge
4 Tyler's cases had been reassigned.

5 MR. EBERHARDT: What happened at that
6 point was that I quite frankly was confused as to
7 where this case was, the docket sheet being in Judge
8 Tyler's unit, his disclaimer of any knowledge of the
9 case, and yet the clerk saying 73 Cr. 471 was indeed
10 with Judge Tyler.

11 The upshot of it was within a couple of weeks
12 I asked Mr. Lutz to file a notice of readiness out of
13 sheer desire to see what action it would spur, because
14 I didn't know where the case was. Mr. Lutz
15 attempted to file a notice of readiness and a couple
16 of weeks later we learned that that notice of readiness
17 had never been docketed because I asked him to check
18 to see what happened because we never learned what
19 happened. We filed another notice of readiness
20 which the docket reflects was filed on April 30th.

21 I know a notice of readiness under the rules
22 has no significance. I did it really out of frustra-
23 tion, to be quite honest with you, your Honor.

24 What transpired then was -- and this I
25 gathered from a conversation that Mr. Aronwald of my

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2 office had with Judge Carter, that upon his receipt of
3 that second notice of readiness that was docketed
4 he realized he still had the case. That prompted
5 the memo he filed with the Assignment Committee.

6 THE COURT: That apparently is correct,
7 though ordinarily when they reverse a conviction the
8 clerk of the court has the courtesy to telephone the
9 district judge so he learns about it first hand before
10 he reads it in the newspaper.

11 MR. EBERHARDT: That is precisely the
12 point.

13 THE COURT: Those calls always come be-
14 for lunch. Their intention is to give you indigestion.

15 MR. EBERHARDT: In fact, Mr. Aronwald spoke
16 with Judge Carter about this and, indeed, he had exactly
17 the same impression as to what the procedure would be.
18 He assumed that because the Court of Appeals opinion
19 was so clear as to require Judge Carter not preside
20 at the second trial, that the Assignment Committee would
21 pick up the case for reassignment.

22 THE COURT: I don't know why anybody on
23 earth would think that. I have nothing before me
24 that would indicate it was Judge Carter's viewpoint.
25 The rules are clear. It would be totally wrong for

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2 the Assignment Committee, of which I am a member, to
3 interfere with a district judge's docket and take a
4 case away from him without some prior procedure to
5 submit it for reassignment. The thought is ridiculous,
6 frankly.

7 MR. EBERHARDT: I hope the court isn't
8 saying my representation is ridiculous.

9 THE COURT: You must have misunderstood
10 what he said. It is just not possible.

11 MR. EBERHARDT: The only thing I can
12 suggest to the court is that perhaps this court would
13 consult with Judge Carter.

14 THE COURT: Absolutely not. The rules
15 are published in black and white. Your office has
16 plenty of opportunity to read them. It would have
17 been very simple to have written a letter. Telephoning
18 is fine but every once in a while telephoning backfires
19 because it doesn't get accomplished that which you think
20 it ought to.

21 MR. EBERHARDT: I was told it was
22 accomplished. That is why I had no doubts as to what
23 was happening.

24 THE COURT: It wasn't. It wasn't Mr.
25 Yagid's fault it was not.

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2 MR. EBERHARDT: I am sure it wasn't. I
3 don't mean to make a great issue over credibility, but
4 with respect to Judge Carter's memo that he discussed
5 with Mr. Aronwald, he notes in his final paragraph
6 that apparently this development, referring to the
7 retrial or reversal, had not come to the attention of
8 the Assignment Committee and the case was not yet
9 assigned. It would seem to me to suggest Judge
10 Carter was under some assumption the committee would
11 act on its own.

12 THE COURT: He could be under a misim-
13 pression, but I can imagine what would happen in
14 this building if the Assignment Commiteew was to take
15 a case away from a judge absent a request on his part.

16 May I say further to you the Court of
17 Appeals cannot do anything more than suggest. The
18 assignment of cases is for the District Court under
19 statute. Sure, we always follow their suggestions
20 when they suggest he should not preside, but they have
21 no right to assign the work of this court. That's
22 the function of the District Court, to assign cases,
23 which we do by random selection and by very clear rules
24 which we have.

25 MR. EBERHARDT: I am not suggesting that

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2 they should, but my only point is that is our understand-
3 ing, that is, the government's understanding, that there
4 has been some misunderstanding on the part --

5 THE COURT: That could well be. That
6 is the only circumstance under which I could imagine
7 this rule would ever come into operation, when there
8 is a misunderstanding.

9 MR. EBERHARDT: Assuming for the sake of
10 argument that for some reason somebody in Judge Carter's
11 chambers assumed the Assignment Committee would pick
12 this up automatically --

13 THE COURT: Or someone in your office
14 assumed a telephone conversation with various clerks
15 would have some meaning.

16 MR. EBERHARDT: I did assume because
17 every clerk told me the matter was being taken care
18 of.

19 THE COURT: Sooner or later you were under
20 notice by the lapse of time to write a letter. April
21 30th you wrote and by that time you had had already
22 too much time.

23 MR. EBERHARDT: By April 30th indeed I
24 did.

25 THE COURT: Your time began to run December

16, 1974.

MR. EBERHARDT: I began to act well within the 90-day period.

THE COURT: I am not criticizing you at all, but I think this case is squarely within the rule.

MR. EBERHARDT: If I can only allude --

THE COURT: Everything that was done after mid-February was post-mortem.

MR. EBERHARDT: Mid-March.

THE COURT: I beg your pardon. Mid-March.

MR. EBERHARDT: I am not going to quarrel with that. The case was not ready for retrial --

THE COURT: Where is a copy of the rules?

MR. EBERHARDT: I only have an opinion of the Second Circuit.

THE COURT: Hand it up for a moment. I had all this before me the other day and I don't seem to have it now.

MR. EBERHARDT: Your Honor, the bottom line is simply that within 90 days Mr. Yagid was not retried.

THE COURT: And that the circumstances which seem to be more or less beyond dispute here do not

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show that the time was extended for good cause and do not show that there was any overriding public interest in the matter which took the rule out of operation.

MR. EBERHARDT: The only thing I can say is that --

THE COURT: Good cause.

MR. EBERHARDT: Correct.

The only thing I can say is that the bottom line is within 90 days the case, having not been re-assigned to another judge, there was absolutely no possibility that the case could be tried because of the Court of Appeals direction Judge Carter not preside over this matter.

THE COURT: Do we have that opinion here? They can't make such a direction. All they can say is in the interests of justice he should not. It is probably an academic difference because nobody would try the case under such a Court of Appeals recommendation, but the statute is very clear who assigns cases in the District Court.

MR. EBERHARDT: I have the opinion here. I am trying to find the point.

(Pause.)

MR. YAGID: May I read it to you, your

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2 Honor.

3 THE COURT: I will let him hand it up.
4 I think that will save time. I don't have the statu-
5 tory citation here before me but the statute says
6 that the District Court in a multi-judge court shall
7 agree upon a division of its business.

8 I hasten to make clear that the slightest
9 suggestion by the Court of Appeals that a different
10 judge should reside would always be honored.

11 MR. YAGID: I think it is couched in
12 terms of a suggestion. That is the rule.

13 THE COURT: It is not the rule.

14 MR. YAGID: The rule is that it is this
15 court's Assignment Committee determines what judge
16 gets the case.

17 THE COURT: They say another district
18 judge should preside. There is no question in
19 my mind that there is not a judge sitting in the United
20 States who wouldn't honor such a suggestion. However,
21 it is nothing which takes out of the hands of the
22 judge on whose docket this case is and always was, as
22 far as Mr. Yagid is concerned, the right to invoke the
24 rule or not invoke the rule. This suggestion made
25 in that opinion is directed to Judge Carter, not the

Assignment Committee.

MR. EBERHARDT: I understand that.

THE COURT: Our rules say a judge who has presided at a mistrial or a trial which has been reversed on appeal may submit the matter for re-assignment. It's a matter of his absolute right.

MR. EBERHARDT: My conversation with Mr. Sexton, who I understand is responsible for this in the clerk's office, has always suggested this.

THE COURT: He works for the committee. He is not responsible for doing anything except carrying out orders.

MR. YAGID: May I add one thing to that?

THE COURT: All right.

MR. YAGID: This goes back a long time ago. When I was waiting for all of this to come down from the Court of Appeals and I was very impatient at the time, your Honor, as you might imagine, so I have a very vivid memory, I was a pain in the neck. They referred to it as something else, but I will say pain in the neck because I was in there almost every other day waiting for it to come down.

THE COURT: Clerks do not and should not

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2 run the affairs of this court, Mr. Yagid.

3 MR. YAGID: I want to give you an experi-
4 ence.

5 I kept on checking with Judge Carter's unit,
6 and Judge Carter's unit finally referred to me -- I am
7 pretty sure that the gentleman's name, now that I
8 remember, is Mr. Sexton, if he is a big, large man --

9 THE COURT: I don't want to hear about
10 Mr. Sexton.

11 MR. YAGID: At that time he told me
12 that the case had been reassigned from Judge Carter to
13 Judge Tyler.

14 THE COURT: He told you erroneously, Mr.
15 Yagid. Get that out of your head.

16 MR. YAGID: I wanted to put it on
17 record.

18 THE COURT: He told you erroneously. I
19 have the docket sheet before me. All that was before
20 Judge Tyler here was the sentencing of this co-defend-
21 ant, Jerome Allen, which was perfectly reasonable
22 because Jerome Allen was already on Judge Tyler's
23 docket with a different indictment.

24 MR. YAGID: I have no reason to doubt what
25 you say but Mr. Sexton said --

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2 THE COURT: I don't care if he said the
3 moon was made of green cheese.

4 MR. YAGID: What I am trying to say is
5 Mr. Sexton said the Assignment Committee had done so
6 because the case was already with Judge Tyler, and
7 for that reason. because he had knowledge and everything
8 else, that it was the proper thing for the Assignment
9 Committee to do and that's what the Assignment Committee
10 did. This is the way he explained it to me.

11 THE COURT: He was wrong. That's all
12 there is to it.

13 MR. YAGID: Yes, sir. All I wanted you
14 to know is what he informed me months ago.

15 MR. EBERHARDT: Same thing for me. If
16 I could conclude my remarks.

17 THE COURT: This is a typical type of mix-
18 up. You can call it a trap for a prosecutor.

19 MR. YAGID: I investigated the matter for
20 months.

21 THE COURT: Please sit down, Mr. Yagid.

22 MR. EBERHARDT: I would like to make one
23 brief comment. If I could retrieve that opinion
24 before your Honor, I would like to make it.

25 THE COURT: I had a complete file before

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2 me the last time you were here, but I don't seem to
3 have all my papers.

4 MR. EBERHARDT: Your Honor, the government
5 would contend that the delay with respect to this
6 case should be characterized as a manufactured delay
7 and that in connection with the Roemer case, decided
8 by the Second Circuit April 8, 1975, that such a delay
9 should be considered within the language of that
10 decision. That decision at page 2780 indicates
11 that there are basically two precepts that dictate an
12 inquiry into this type of delay.

13 The first is, the court quotes the Drummond
14 case and says:

15 "The escape hatch of good cause must be
16 construed with an awareness of practicality."

17 And with respect to that the government
18 respectfully submits that in this case, quite candidly,
19 the practicalities of administrative foulup should
20 be considered by the court.

21 Secondly, that decision indicates that the
22 idea leading to the District Court plan was not established
23 to safeguard defendants' rights.

24 THE COURT: The key word there is "pri-
25 marily."

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2 MR. EBERHARDT: Yes, but instead to serve
3 the public interest in the prompt adjudication of
4 criminal matters.

5 I do not know or I would contend the
6 government's position is that whatever extra delay there
7 has been with respect to this case has not in any way
8 jeopardized the public interest and the prompt adjudica-
9 tion of this case.

10 I might add in conclusion there are a couple
11 of facts that should be considered also by this court.
12 Mr. Yagid, in spite of our requests to obtain counsel,
13 did not obtain counsel.

14 THE COURT: I understood he was indigent.
15 Wasn't he in prison?

16 MR. EBERHARDT: No, sir.

17 THE COURT: Weren't you in prison on this
18 case?

19 MR. YAGID: No.

20 MR. EBERHARDT: Finally, the government
21 filed a notice of readiness with respect to the earlier
22 trial and I can represent to the court that 90-day
23 period I was ready, able and willing to try this case,
24 and respectfully the government would ask the 90-day
25 rule in this particular case be not applied for the

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2 reasons stated.

3 THE COURT: Maybe you could tell me when
4 or how or what possible hypothetical case the rule
5 would be applied to. I don't mean to engage in any
6 dispute or argument with you but I would like to
7 think this through. When ever, if not here, would
8 the rule be applied? Bear in mind there has been
9 no violation of the man's Sixth Amendment rights. We
10 are not talking in the sense of those old cases like
11 Wingo and so forth, Barker v. Wingo, where they went
12 for years and where the accused or at least the court
13 said he should have raised the issue.

14 We are talking about a rule here. Just
15 tell me what hypothetical case can you postulate where
16 this rule would come into effect if it doesn't come
17 into effect here?

18 MR. EBERHARDT: I think the best thing
19 that comes to my mind is another problem my office has
20 recently had. A hypothetical out of that perhaps
21 would be illustrative.

22 THE COURT: The rule never should have
23 been passed but it's in effect and I am bound by it.
24 Just tell me a hypothetical case where it would be
25 proper in your view to apply this rule if not here.

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2 MR. EBERHARDT: If there were a reversal
3 with 90 days and the matter was put on before the
4 original trial judge or another trial judge and the
5 court called a pretrial conference to take care of mo-
6 tions and set a trial date and if after advising the
7 prosecutor of a trial date within 90 days, the prosecutor
8 said, " I have other matters," and it was not assigned
9 to another prosecutor.

10 THE COURT: Can you imagine that happening,
11 particularly with your office where you can call upon
12 people from other districts?

13 MR. EBERHARDT: The only problem with this
14 is this is a good example of a case that was fairly
15 complex. Mr. Yagid will attest to that. It is
16 difficult to bring in an attorney at the last minute.
17 All I am saying is if the government could not proceed
18 or indicated for invalid reasons it would not proceed
19 within 90 days, the rule should be applied. I am
20 not saying in this case the 90-day rule has no applica-
21 tion. All I am saying is in this particular case
22 the 90-day rule was not complied with because of
23 administrative reasons out of the control of Mr. Yagid
24 for certain and the government as well.

25 I represent to this court that I did my

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2 darn best to spur this case to trial within 90 days.

3 THE COURT: You don't want me to test that
4 by hindsight, but telephone calls are no substitute for
5 a paper. I am not holding you up to any criticism
6 whatever. I recognize in the administration of my
7 own docket I expect fellows like you to be in direct
8 telephone communication with my staff and if there is
9 any misunderstanding as a result of a telephone call,
10 I try to resolve it amicably. But I think you
11 have to test the picture here as of about March 15th
12 or 16th and by that time -- again I don't say this
13 critically of you, but by that time, failing to achieve
14 any result called for by early March, some kind of a
15 letter should have been sent, which the assigned
16 judge would have attended to immediately, as he ultimately did when he received your notice of readiness.
17 He received your notice of readiness filed on the
18 30th and -- am I correct on that -- the 30th of April,
19 and while you recognize it was a nullity it galvanized him into action and he by May 23rd memorialized
20 the Assignment Committee by memorandum in writing.

23 So that, as I say, I think hindsight always
24 gives us perfect vision, but I think I ought to take
25 this under advisement and read the cases again. I am

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not prepared to dispose of it on the bench, but I really think that it looks to me like a proper case for the application of the rule.

MR. EBERHARDT: Your Honor, does the court wish any further supplementation of the record? That is, I would be glad to give the court an affidavit maybe crystallizing the government's position.

THE COURT: Do you dispute anything that has been said here about the chronology?

MR. EBERHARDT: Not really.

THE COURT: I am taking as truthful the statements you have made here today.

MR. EBERHARDT: They are indeed.

THE COURT: So I don't think there is any need for a supplemental affidavit.

MR. EBERHARDT: The only thing I might add is I recognize the clerks don't run this District Court and they properly should not, but my representation to this court is I had at least two if not more conversations with Judge Carter's clerk and he advised me the matter was being taken care of, he was aware of the problem.

THE COURT: By the first week in March or perhaps by the end of February some paper should have

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2 been sent. Now, I am testing that by hindsight.
3 I have to concede that is so. I am not intending to
4 say anything on this record that is critical of you or
5 your assistants or your office or Judge Carter or
6 anybody else, but I think that this is a situation
7 tailor-made for the rule. I will just have to look
8 into it a little further.

9 MR. YAGID: Your Honor, may I have a
10 word?

11 THE COURT: Certainly. You are a
12 lawyer. You know you quit when you are ahead, don't
13 you? All right, you may have a word.

14 MR. YAGID: A very short word. When
15 this statute was promulgated it was written in a
16 very particular and precise manner. It also had
17 certain legislative and editorial comments made at
18 the time it was written, as most statutes usually do.
19 In addition, there has been a recent statute passed,
20 I think they refer to it as the Ervin -- I am
21 sorry; it escapes me at the moment. It takes effect
22 July 1, 1975. The legislative history and the
23 editorial comments in there are startlingly apropos of
24 some of the discussions that were had here this morning.
25 But the main point and the quickest point that I want

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2 to make is very simply this: 1, 2, 3 and 4 of
3 this plan are written in a particular fashion. 5
4 alludes specifically thereto and it says:

5 "In computing the time at which the govern-
6 ment should be ready under 3 and 4, the following
7 periods should be excluded."

8 1, 2, 3 and 5 are then therefore disposed
9 of as a unit. We then come to 6, which is specifically
10 and very definitely taken up as a definite and specific
11 category in and of itself because there are separate
12 and distinct considerations to be given to an order of
13 retrial rather than the multitude of other situations
14 that come up under 1, 2, 3, 4 and 5.

15 THE COURT: The court knows that.

16 MR. YAGID: I am not pointing that out
17 to the court. I am actually directing my remarks to
18 Mr. Eberhardt for his benefit.

19 There are cases, and unfortunately I
20 didn't move to them fast enough. I should have while
21 this whole conversation started. I don't remember
22 if any of them are Second Circuit cases, but there are
23 court cases which I would like to have cited which
24 indicate that in such specific instances it is the duty
25 primarily of the prosecutorial office, secondarily of

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2 the judiciary, and lastly on the part of the defend-
3 ant.

4 I didn't really understand, your Honor, and
5 I am really half asking a question at this point, as
6 to what you were alluding to before. I think you
7 went a little over my head. I didn't know whether
8 you were putting the onus upon Judge Carter.

9 THE COURT: Absolutely not.

10 MR. YAGID: I am not about to stand here
11 and defend Judge Carter in any way. I take an im-
12 partial view.

13 THE COURT: Absolutely not. The facts
14 speak for themselves. I am not putting the onus
15 on anybody.

16 MR. YAGID: Other circuits have said it
17 is a prosecutorial duty to worry about in this instance
18 the 90-day, in other circuits 60-day, or whatever days
19 statute there are applicable in the other circuits, but
20 they all seem to agree that it is the prosecutorial func-
21 tion to worry about that.

22 THE COURT: I think I have heard enough.
23 I am going to take the matter under advisement.
24 Decision is reserved.

25 Is there any way to accommodate this request

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2 for the transcript of the argument? I don't know that
3 I have a basis for giving it to him out of federal
4 funds, but I really don't know why both sides should
5 not have it.

6 MR. YAGID: May I submit the order to you.

7 THE COURT: The order says you can get
8 it but not under the Criminal Justice Act. That is
9 the problem I face with it. I would think you could
10 work that out in a gentlemanly fashion. Can't you
11 talk with each other about that?

12 MR. EBERHARDT: I suppose we can. The
13 only thing that really troubles me is Mr. Yagid was
14 represented by Legal Aid at the time of his appeal and
15 that this particular order, and I assume the Court of
16 Appeals knew that when they ordered that this motion
17 would be granted provided Mr. Yagid pay the expense.
18 I don't have a copy of it. If I had a copy of it
19 I would be glad to give it to him.

20 THE COURT: Don't you think you ought to
21 order a copy of it for yourself. There must be some-
22 thing significant in it.

23 MR. EBERHARDT: I was there.

24 THE COURT: What do you need it for?

25 MR. YAGID: Your Honor, I don't mean to

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2 beg the question and I am not pussyfooting and I don't
3 want to try your patience --

4 THE COURT: He said you could have it but
5 it is left for me to determine whether it can be
6 authorized for you at public expense. I can only authorize
7 it if it is necessary to provide for your defense.
8 I can't offer it to you because you feel it shows some-
9 thing important or something which helps prosecute
10 somebody else. I don't want to take anything in
11 camera.

12 MR. YAGID: I am not going to suggest you do
13 if you don't want to.

14 THE COURT: I don't know how much money
15 it is either, you see.

16 MR. YAGID: There is a rule -- I just
17 wanted to indicate as to what importance Judge Mulligan
18 might have given the matter. There is a rule that
19 was promulgated about a year ago which says applications
20 for such things will not even be entertained.
21 Because of the fact that the rule was that no such applica-
22 tionis should be entertained and that rule was promulgated
23 by the administrative justices of the Second Judicial
24 Circuit, after a conference with Mr. Fusaro, who took
25 it up with the administrative judge, who then referred

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2 it to the Hon. Judge Mulligan, Judge Mulligan thought
3 well enough of it to bypass this rule, which was a
4 steadfast rule which said no application would ever
5 be entertained, and he immediately entertained my
6 letter as an application and granted it.

7 THE COURT: All right. What you are
8 asking from me is somewhat different. I would have
9 to make a finding that you are indigent, which I am
10 prepared to do, and a further finding that you need it
11 for your defense because the purpose of it --

12 MR. YAGID: I think I will cut that short
13 if this is going to create as big a problem -- I didn't
14 think it really would -- I would rather drop it at this
15 point.

16 THE COURT: You can drop it without
17 prejudice to renewing if you show a need.

18 MR. YAGID: I thank you for that last
19 statement.

20 THE COURT: You will have it without preju-
21 dice to renew on a showing of necessity.

22 MR. YAGID: To the government.

23 THE COURT: Yes. Good afternoon.

24 MR. YAGID: Your Honor, if you will excuse
25 me for 30 seconds. Not being familiar with the

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2 criminal procedure, may I know just how we are adjourning
3 at this point? In other words, what is the status
4 at this point?

5 THE COURT: You are continued on your bail
6 and I am reserving decision on your motion. I am
7 going to read these cases and reach a decision as
8 promptly as I can do so.

9 MR. YAGID: What I wanted to know is
10 whether you wanted any submission of memorandum or
11 any other kind of submission on my part on the matter?

12 THE COURT: I don't think so. I will
13 do my own research on it.

14 MR. YAGID: Thank you.

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Memorandum and Order (Brieant, J.),
dated July 7, 1975 re: Defendant's
Motion to Dismiss Indictment

Reckwald
(S/P)
U.S. DISTRICT COURT
FILED
JUL 7 1975
S. D. OF N. Y.
Lucy
73 Cr. 471
#42749

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :

-v- :

JERRY ALLEN, SALVATORE THOMAS
BADALAMENTE, ARTHUR BERARDELLI, :
JAMES FEENEY, LOUIS STERN a/k/a :
LOUIS RUSH, LEONARD TURI and :
HERBERT YAGID, :

MEMORANDUM AND ORDER
[Motion of defendant
Yagid to Dismiss]

Defendants.

-----X

Brieant, J.

On May 21, 1973 an indictment was filed charging Herbert Yagid and six others with serious criminal conduct, including conspiracy to transport, in interstate commerce, forged or counterfeit securities, and the substantive crime which was the object of the conspiracy, said to have been committed in 1973.

After trial before another Judge of this Court (hereinafter the "Assigned Judge"), a jury convicted Yagid on both counts on March 8, 1974. He was sentenced on April 11, 1974, and on November 21, 1974 the Court of Appeals reversed his conviction, granting a new trial (sub nom. United States v. Badalamente, 507

F.2d 12).

In its opinion, the Court of Appeals observed that the case "should" be reassigned for retrial to another Judge. This provision represented the considered opinion of the appellate court, but is not a direction that the case be reassigned. It is instead a recommendation which out of comity, respect and our desire to achieve the appearance of justice, as well as doing justice, any district judge is certain to accept and follow. Such a provision in an appellate opinion, however, does not, nor should it, effect, without more, an automatic reassignment of the case.

This is so for many reasons. Congress by statute has entrusted to the judges of a multi-judge district court and their Chief Judge the sole power to provide for the assignment of cases. 28 U.S.C. §137. This our District has done in accordance with elaborate rules (hereinafter, the "IAC Rules") adopted by the Court pursuant to that statute.

IAC Rule 16 provides:

"In case of a conflict of interest, or disqualification on the part of the assigned judge, or upon his request, if he has presided at a mistrial or former trial of

the case, the Assignment Committee shall transfer the case by lot." [Emphasis added]

Circumstances may arise after the mandate under which such a case should not be reassigned. For example, the prosecutor may conclude there is no use retrying the case when more important miscreants remain to be pursued, or he may decide that the law of the case decided on the appeal makes conviction unlikely. Often, a defendant will plead guilty to one count following remand, expecting the Government will dismiss the remaining counts against him and he will be resentenced less severely, because the plea limits his guilt, and he may prefer to have sentence imposed by the Assigned Judge. Furthermore, the prosecutor may submit an order nolle prosequere. Approval of this order is directed to the discretion of the district judge, and there seems to be no reason why the Assigned Judge is not in a better position to approve the nolle, than a judge having no familiarity with the case. Other possibilities suggest themselves. It is possible that a defendant might waive the recommended reassignment, or might withdraw his jury demand on retrial, relying on the law of the case as uttered by the appellate court, and his confidence in the desire of the Assigned Judge to follow the mandate faithfully.

Furthermore, the IAC Rules are administered by an Assignment Committee, composed of Judges whose primary responsibility is to administer their own dockets, rather than to pry uninvited into the activities of their colleagues. It would be demeaning and inappropriate for the Assignment Committee to engage in a continuous review of the docket of 24 other judges in search of possible committee business.

Accordingly, notwithstanding a recommendation of the Court of Appeals that a case "should" be reassigned to another judge, no reassignment should be expected to take place except upon the initiation of the attorney for the Government or defendant, or on the application of the Assigned Judge himself.

With this background we turn to the chronology of the instant case and the effect thereon of recently decided cases construing Rule 6 of this District's Plan for the Prompt Disposition of Criminal cases. That rule provides:

"6. Retrials.

Where a new trial has been ordered by the district court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order unless extended for good cause."

The mandate of the Court of Appeals reversing as to Yagid was filed in the District Court December 16, 1974.

Accordingly, the retrial was required to commence not later than Monday, March 17, 1975.

As previously noted, there is no basis by which the case would automatically be reassigned without initiation by the Assigned Judge or counsel for defendant or the Government. The defendant did nothing. Although a member of the bar, he had no attorney. He appears to be indigent, and the attorney assigned by the Court of Appeals for purposes of the appeal was unwilling to serve on retrial.

The prosecutor attempted, by telephone calls to Chambers of the Assigned Judge, and to various employees of the Office of the Clerk of the Court, to ascertain when or whether the case would be reassigned for retrial. His efforts were unsuccessful, and one of the Clerk's employees inadvertently misinformed the prosecutor.^{1/}

Tested by hindsight, a standard applied with care, reasonable procedure for the prosecutor would have been to write directly, on notice to the defendant, to the Assigned Judge

requesting a conference on the record, or to make a motion. We should consider the factual situation here as of March 17, 1975 to determine whether, within the meaning of Rule 6 "good cause" for the extension of the time period for retrial exists. But it may be constructive to see what happened after that date. On April 30, 1975, the Government filed a "Notice of Readiness" effective on and after May 5, 1975. This paper was totally inapplicable to a case pending for retrial; indeed, the Government had previously filed its Notice of Readiness on June 21, 1973. This fact was recognized by the prosecutor, who conceded on the oral argument of this motion, that he did so solely to bring the matter to a head.

Under date of May 23, 1975, the Assigned Judge issued a memorandum to the Assignment Committee, stating in part as follows:

"I have just received a notice of readiness for trial on or after May 5 [1975] in the above case. ... [T]he opinion of the Court of Appeals suggests that I not preside at the retrial. Apparently this development had not come to the attention of the Assignment Committee, and the case has not yet been reassigned. I would suggest that the reassignment proceed without delay, and that the Judge who is to preside over the trial be advised that he may have to proceed with the trial of this case promptly."

On June 3, 1975, or at some time prior thereto, the Assignment Committee convened, and reassigned the case to me by random selection. Such reassignment was made a matter of record on June 4, 1975 and on that date I was first notified of my responsibilities with respect to Yagid's case.

An initial pre-trial conference and status report was called by me for June 20, 1975, and attended by defendant in person.^{2/}

Defendant, a knowledgeable individual and a member of the bar, although not versed in criminal practice, has made an adequate presentation acting pro se, for purposes of this motion made orally on July 2, 1975, to dismiss for failure to retry him by March 17, 1975 pursuant to Rule 6.

Our Court of Appeals has held in United States v. Roemer, ____ F.2d ____ (docket No. 74-2677, decided April 8, 1975) that:

"the Plan was not established primarily to safeguard defendants' rights ... [but instead], to serve the public interest in the prompt adjudication of criminal cases.' United States v. Flores, 501 F.2d 1356, 1360 n.4 (2d Cir. 1974) (per curiam)."

We would respectfully suggest that the word "primarily"

above quoted be replaced by the word "solely." A defendant's speedy trial rights are protected adequately by the Sixth Amendment to the United States Constitution. Barker v. Wingo, 407 U.S. 514 (1972). Indeed, a criminal defendant, not insane, who desires a speedy trial is Rara avis in terris nigroque simillima cygno, which is not to say that he will never be encountered. We should recognize this obvious fact.

We state another obvious fact: Judges are too preoccupied with their judicial duties to make good legislators. This Court and others, apparently without foreseeing its possible consequences adopted Rule 6 from a "model plan" which had been circulated by the Administrative Office of the United States Courts in response to amended F.R.Crim.P., Rule 50(b). Six district courts in the Second Circuit adopted Rule 6 of the "model plan." This case, which appears to be squarely within the rule is a good example of its potential for mischief. Many judges in this district find that they are scheduling criminal and civil matters as far ahead as sixty or ninety days in order to assist busy attorneys to plan their work, assure cases will be ready when reached, and satisfy many other exigencies.

The public interest sought to be served under Rule 6 could be served simply by requiring the prosecutor to write a letter to the Court with a copy to his adversary, or if necessary, to proceed by motion, within thirty (30) days of the mandate, asking for a pre-trial conference, and for the setting of a trial date. Judges have adequate experience setting trial dates so as to accommodate the interests of Justice. We are certain that no district judge would reject the request for the earliest possible trial date in the case of a retrial. Haply there might be other cases of greater social significance entitled to priority, e.g., a first offender denied bail, or an injunction hearing affecting the people of an entire city.

But, as the Rule presently exists, the Court cannot imagine a situation more clearly in violation thereof than Yagid's case. I find that Rule 6 has not been complied with, and, accordingly, the indictment should be and it hereby is dismissed.

I refuse to find that Yagid was in any way deprived of his Sixth Amendment rights to a speedy trial. Cf. Barker v. Wingo, 407 U.S. 514 (1972). He made no demand for a retrial, and indeed it was not until this Court summoned him for a pre-trial conference

on June 20, 1975 that he requested new counsel, or informed the Court of his indigency and inability to retain private counsel on the retrial. If he had counsel, the Court could have begun his trial on July 3, 1975.

We would say under these circumstances that dismissal under Rule 6 would be "without prejudice", except that we share the view of Judge Prentice H. Marshall expressed in United States v. Jackson, 374 F.Supp. 168, 178 (N.D. Ill. 1974):

"I do not understand the significance of [the] term ['with prejudice'] in a criminal case. [citation omitted] So far as I am aware, unless jeopardy has attached or some other bar is interposed in behalf of the defendant he may be reprosecuted following a pre-trial dismissal of an indictment so long as the statute of limitations has not run at the time of reindictment."

We adopt the reasoning of United States v. Clay, 481 F.2d 133, 135 (7th Cir. 1973):

"Although the trial judge may have intended to dismiss the indictment with prejudice [footnote omitted], such a result would have been unwarranted. The order of dismissal did not adjudicate the merits of the government's charge. Nor did it rest on a finding that the defendant's constitutional right to a speedy trial had been denied. [footnote omitted] Indeed, the court expressly disavowed any such ground for his decision.

It is, of course, well settled that a Rule 48 dismissal may rest on a non-constitutional ground⁵, [footnote 5 - "Appellant says, however, that the dismissal was granted under Fed.R.Crim.P. Rule 48(b), for 'want of prosecution,' and that this is equivalent to a finding that he had been denied his constitutional right to a speedy trial, which finding is res adjudicata and cannot now be re-examined. But even accepting appellant's contention that this was a Rule 48(b) dismissal, the conclusion does not follow. That Rule is much broader than he imagines. Undeniably, it implements the constitutional guarantee of a speedy trial. See Pollard v. United States, supra, 352 U.S. [354] at 361, n. 7 [77 S.Ct. 481, 1 L.Ed.2d 393]. But it goes further. As the Committee Note indicates, Rule 48(b) 'is a restatement of the inherent power of the court to dismiss a case for want of prosecution.' And that power is not circumscribed by the Sixth Amendment. There are many cases in which the court, moved by the plight of an accused unable to make bond, will, and should, enlarge him, even though there has been no violation of the Speedy Trial Clause. If the judge could not do so, except with prejudice to a subsequent prosecution within the limitation period, serious inequity would result." Mann v. United States, 113 U.S.App.D.C. 27, 304 F.2d 394, 398 (1962).] and normally such a dismissal is without prejudice to a subsequent prosecution.⁶ [footnote 6 - Dortch v. United States, 203 F.2d 709, 710 (6th Cir. 1953).] We believe a dismissal for the purpose of 'calendar control' is in the same category. We therefore construe the district court's order as a dismissal without prejudice."

We do not consider ourselves bound to a contrary result by footnote 3 in United States v. Flores, 501 F.2d 1356 (2d Cir. 1974) or Hilbert v. Dooling, 476 F.2d 355 (2d Cir. 1973).

As Judge Mansfield pointed out in Hilbert (p.358), the Court of Appeals was there construing its own Judicial Council's rule, the history and purpose of which it knew. The rule construed in Flores is a reenactment by the District Court of the same rule previously made by the Judicial Council and construed in the Hilbert case. The District Court in Flores must be assumed to have intended the result of Hilbert. Also, Hilbert and Flores are concerned with what amounts to prosecutorial negligence or misconduct. In the instant case, the prosecutor, if he was at fault at all, shared his fault with those gremlins who are forever responsible for making the acronym SNAFU truly reflective of the American bureaucracy.

We know our own legislative history: the farthest from our minds in adopting Rule 6 was any notion that the putatively guilty would escape prosecution as a result of the type of administrative blunder or oversight which would invoke Rule 6. We doubt that Congress knowingly would permit creation by judicial

rulemaking of such a loophole as is furnished by Rule 6; a loophole not only for the putative criminal who benefits by administrative failures in the system, but also a loophole by which a prosecutor minded to do so, could in effect obtain a nolle prosequere of an indictment, without complying with the procedural safeguards ordinarily attendant upon the filing of a nolle. To obtain the exact equivalent of a nolle through the invocation of Rule 6, he need only sit on his hands and hope that the filing of the mandate of the Court of Appeals escapes attention of a Judge of this busy Court.^{3/}

As to defendant Yagid the indictment is dismissed. Such dismissal shall not constitute a judgment of acquittal, nor shall it be a bar to a new indictment.

So Ordered.

Dated: New York, New York
July 7, 1975

CHARLES L. BRIEANT, JR.
U. S. D. J.

F O O T N O T E S

1. The case against a co-defendant Allen, had, with his consent been reassigned to then Judge Tyler of this Court solely for the purpose of sentence, because Judge Tyler had other, unrelated, indictments in which Allen was to be sentenced. This limited participation by Judge Tyler properly resulted in the temporary transfer of the docket sheet of this indictment from the recordkeeping unit serving the Assigned Judge, into the recordkeeping unit in the Clerk's Office serving Judge Tyler. This did not effect a reassignment of Yagid's case. Apparently a clerk, finding the papers in Judge Tyler's Unit assumed incorrectly and advised that Judge Tyler had Yagid's case. Beginning about mid-March, 1975, after Judge Tyler was invited to assume an executive position in the Justice Department, he ceased trying criminal cases so as to avoid any appearance of possible bias. Shortly thereafter, all of Judge Tyler's criminal cases were, at his request, reassigned to other Judges by random selection.
2. For reasons not germane to this motion, the Court's efforts to assign an attorney from our panel, established under the Criminal Justice Act to represent indigent defendants,

have been unsuccessful. Such efforts caused the delay between June 20 and July 2, 1975.

3. Often the mandate will not issue immediately, pending consideration of whether en banc hearing or reargument should be granted, or pending a petition for certiorari to the Supreme Court.

AFFIDAVIT OF MAILING

State of New York)
County of New York)

JOHN D. GORDAN, III, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 6th day of August, 1975
he served ^{2 copies} ~~xxxxxx~~ of the within Appendix
by placing the same in a properly postpaid franked
envelope addressed:

MR. HERBERT YAGID
677 Raritan Road
Cranford, New Jersey

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing at the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

John D. Gordan III

Sworn to before me this

6th day of August, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1-4-75
Qualified in Kings County
Commission Expires March 30, 1977